

Fatoki (Migration) [2024] AATA 1530 (20 May 2024)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Abiodun Kolawole Fatoki
CASE NUMBER:	1923522
HOME AFFAIRS REFERENCE(S):	BCC2014/3130337
MEMBER:	Andrew McLean Williams
DATE:	20 May 2024
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Migrant) (Class BC) visa.

Statement made on 20 May 2024 at 2:46pm

CATCHWORDS

MIGRATION – Partner (Migrant) (Class BC) visa – Subclass 100 (Partner) – genuine and continuing relationship – validly married – relationship ceased – no evidence of alleged family violence – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5, 65
Migration Regulations 1994, Schedule 2, cl 100.221; r 1.15

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an *Application for Review* of a decision made by a Delegate of the Minister for Home Affairs on 5 August 2019 to refuse to grant the visa applicant ('the Applicant') a Partner (Migrant) (Class BC) visa under s.65 of the *Migration Act 1958* (Cth) ('the Act').
2. The Applicant applied for the visa on 20 November 2014, on the basis of his relationship with his sponsor. At that time, Class BC contained one subclass: Subclass 100 (Partner).
3. The criteria for the grant of a Subclass 100 visa are set out in Part 100 of Schedule 2 to the *Migration Regulations 1994* (Cth) ('the Regulations'). The primary criteria must be satisfied by at least one Applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The Delegate in this case refused to grant the visa on the basis that the Applicant did not satisfy clause 100.221 because the Delegate was unable to be satisfied on the basis of the available information that the Applicant continued to be in a genuine and continuing spousal relationship with his sponsor Ms Nicola Jo-Anne Fatoki.
5. For the following reasons, the Tribunal has concluded that the **decision under review should be affirmed**.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The issue in the present case is whether the Applicant is able to satisfy the requirements of clause 100.221 in Schedule 2 of the Regulations. This is a 'time of decision' requirement.
7. **Whether the parties are in a spouse or de-facto relationship**
8. Clause 100.221 requires that the Applicant meet one of five alternative requirements. These include clause 100.221(2) and (2A) which require, among other things, that at the time of this decision, the Applicant is the 'spouse' or 'de-facto partner' of the 'sponsoring partner'. Unless the Applicant was granted a Subclass 309 visa by Ministerial intervention, the 'sponsoring partner' is the person who was specified as the Applicant's spouse or de-facto partner or intended spouse or de-facto partner in the related Subclass 309 application, being an Australian citizen, permanent resident or eligible New Zealand citizen.
9. In the present case the Applicant claims to be the spouse of his sponsor, a 'sponsoring partner' within the meaning of that term.
10. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in regulation 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in regulation 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

11. If the parties are validly married, they may meet the requirements of a married relationship, but not those for a de facto relationship. On the evidence, which comprises a marriage certificate dated 9 July 2013, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

12. In the decision now under review the Delegate was not satisfied, given the sheer paucity of submitted evidence, that the Applicant remained in a genuine and on-going spousal relationship with his sponsoring partner. This Application for Review was subsequently filed in the Tribunal on 22 August 2019.
13. On 26 September 2023 the Tribunal wrote to the Applicant, inviting that he submit information in demonstration that he remained in a genuine spousal relationship with his sponsor, or evidence to show that his relationship had ended either due to the death of his sponsor, or in circumstances in which he had been the victim of family violence.
14. On 9 October 2023 the Applicant wrote to the Tribunal, advising that he now intended to rely upon the family violence exception when seeking grant of the visa, and requested additional time within which to seek evidence in support of that claim. On the basis of that correspondence the Tribunal proceeds on the basis that the Applicant is no longer in an ongoing relationship with his sponsor.
15. On 21 November 2023 the Applicant again wrote to the Tribunal, this time advising as follows:

16. I indicated in my previous email that I intend on proceeding with my review application under the family violence exception noted in your letter.

17. I am unsure as to how long it may take for my evidence to be prepared given engaging in sessions with mental health professionals and requesting reports to be prepared may take several months according to them.

18. I appreciate that the Tribunal may not be able to afford me is much more additional time and a hearing may be scheduled and I understand that it would be my responsibility to provide the relevant evidence by that stage...

19. On 18 April 2024 the Applicant was advised the Tribunal hearing scheduled to take place on 21 May 2024 at 11.00am AEST. On 17 May 2024 the Applicant provided a hearing response in which he indicated that he would not be participating in the hearing, would not be providing any further evidence, and was now content for the Tribunal to proceed and make a decision 'on the papers'.
20. The Tribunal is left in a position wherein it has no further or better evidence before it than was before the Delegate who made the original decision.
21. By his own admission in correspondence with the Tribunal, the Applicant has admitted that his relationship with his sponsoring partner has ended. However, the Applicant has provided no evidence of family violence, despite his having indicated an intention to do so, and despite his having had a reasonable opportunity of several months within which to produce such evidence. Accordingly in the circumstances the Tribunal is satisfied that the Applicant, although married to an Australian citizen, is no longer in a genuine and ongoing spousal relationship with that person.

22. Given these findings the Tribunal is not satisfied that the requirements of s.5F(2) are able to be met at the time of this decision.
23. Therefore, the Applicant does not meet clauses 100.221(2), (3), (4) and (4A).
24. For the reasons above, the Applicant does not satisfy the criteria for the grant of the visa.

DECISION

25. The Tribunal affirms the decision not to grant the Applicant a Partner (Migrant) (Class BC) visa.

Andrew McLean Williams
Member

- 26.

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).